



SECTION 303(d) LISTS AND TMDL LITIGATION (Challenges to EPA Establishment or Approval)

February 2009

PENDING CASES

P P G Industries Inc v. Environmental Protection Agency et al. In June 2008 PPG Industries filed a complaint in Louisiana district court challenging copper and mercury TMDLs established on May 31, 2002 by EPA Region 6 for Bayou d'Inde and the Upper Calcasieu Estuary and Ship Channel. The complaint indicates that PPG has challenged its Louisiana NPDES permit and that the case is pending before the Louisiana Division of Administrative Law. The complaint asserts that these TMDLs should be set aside because they are arbitrary, capricious, an abuse of discretion and/or otherwise not in accordance with law. PPG's challenge to the TMDLs is based on allegations that the record did not support the TMDLs when issued in 2002 as well as post-2002 data indicating the TMDLs are flawed and the TMDLs should be revised. The case has been stayed indefinitely while the parties consider settlement alternatives.

Anacostia Riverkeeper, Inc. v. Johnson. On January 15, 2009, the Anacostia Riverkeeper, Friends of the Earth, and the Potomac Riverkeeper filed a complaint against EPA in district court in the District of Columbia seeking a declaration that fifteen TMDLs established for waters in the District of Columbia pursuant to a July 2000 consent decree are unlawful because they do not contain "daily loads." Plaintiffs seek vacature and remand of the TMDLs in light of *Friends of the Earth v. EPA*, 446 F.3d 140 (D.C. Cir. 2006) and an order that EPA "conclude the remand" within six months.

Anacostia Riverkeeper, Inc. v. Johnson. On January 15, 2009, the Anacostia Riverkeeper and Friends of the Earth filed a complaint against EPA in district court in the District of Columbia seeking a declaration that EPA's approval of revised 2007 TMDLs for sediment and total suspended solids was unlawful because the TMDLs (1) fail to implement D.C. and Maryland water quality standards, including designated and existing uses and criteria for the Anacostia River and its tributaries, (2) fail to account for critical conditions (e.g., high flow events), (3) fail to allocate wasteloads to all individual point sources, and (4) lack an adequate margin of safety. Plaintiffs seek a remand of the TMDLs to EPA and an order that EPA "conclude the remand" within six months.

Conservation Law Foundation v. EPA. On October 28, 2008, the Conservation Law Foundation filed a complaint against EPA in district court in Vermont seeking a declaration that EPA's November 2002 approval of a TMDL for Lake Champlain was unlawful because the TMDL (1) fails to contain adequate "reasonable assurance" supporting point source wasteload

allocations, (2) lacks an adequate margin of safety, (3) does not accurately account for point sources in its wasteload allocations, (4) fails to anticipate impacts due to climate change, and (5) fails to implement Vermont's water quality standards. Plaintiff seeks an order setting aside EPA's approval of the TMDL and calling for establishment of a new TMDL for Lake Champlain.

Barnum Timber Company v. EPA and Stephen Johnson. On April 15, 2008, Barnum filed a complaint in California district court alleging that EPA approval of California's listing of Redwood Creek on the 2006 303(d) list for temperature and sedimentation was arbitrary and capricious. Plaintiff asserted that as a result of the listings, its property has lost value and it incurs substantial extra costs in managing its lands. Plaintiff asked the Court to determine that Redwood Creek is not impaired and asked that the court direct EPA to remove Redwood Creek from California's 303(d) list. Plaintiff also asked the court to enjoin EPA from enforcing any TMDL for Redwood Creek. On June 30, EPA filed a motion to dismiss for lack of standing which was granted on September 29, 2008. On December 4, 2008, the U.S. District Court for the Northern District of California entered a final judgment in EPA's favor. The case is currently on appeal in the Ninth Circuit.

EPA Approval of Iowa's 2002 and 2004 Lists. Thomas, et al. v. EPA, et al., No. 06-115 (N.D. Iowa). On August 10, 2006, Iowa residents and Sierra Club filed a complaint alleging that EPA's approvals of the 2002 and 2004 lists were improper because the lists do not include 71 water bodies that were on Iowa's 1998 list. In part, plaintiffs alleged EPA's approval of the list was improper because Iowa created its 2002 and 2004 lists in compliance with a "credible data law" and by approving Iowa's lists, EPA "effectively adopted and approved reliance on Iowa's credible data law, which ignores much existing and readily available data." Plaintiffs also claim that EPA's approvals of Iowa's 2002 and 2004 lists without these 71 water bodies violate guidance EPA issued in 1994 and 2003 that "describes only two reasons a water body may be removed from a state's 303(d) list."

The case was dismissed by the district court on March 20, 2008. The court rejected all of the plaintiffs' challenges, finding that it must accord EPA a high degree of deference and that the plaintiffs failed to meet their burden of proof in demonstrating that EPA's actions on Iowa's 2002 and 2004 lists were improper. The case is currently on appeal in the Eighth Circuit.

SIGNIFICANT DECIDED OR SETTLED CASES

Constructive Submission Issues

Scott v. City of Hammond, 741 F.2d 992, 996 (7th Cir. 1984), cert. denied, 469 U.S. 1196 (1985) -- Lake Michigan. Plaintiffs alleged that EPA had a mandatory duty under section 303(d) to establish TMDLs for Lake Michigan if the States failed to do so. In this case, the States had not identified any water-quality limited segments or established any TMDLs for Lake Michigan. That fact, coupled with EPA's admission that no TMDL submissions had been made, in the Court's view "raise[d] the possibility that the [S]tates ha[d] determined that TMDLs for Lake Michigan [were] unnecessary." The Court of Appeals remanded the case to the District

Court for a finding whether the States had "refused" to act. "[S]tate inaction amounting to a refusal to act" would be interpreted as a constructive submission of no TMDL, thus triggering EPA's duty to approve or disapprove such submission and to establish the TMDL itself (in the event of a disapproval). On remand, Illinois, Indiana, and Michigan submitted determinations that TMDLs were unnecessary for Lake Michigan; Wisconsin identified four areas for TMDL development. EPA approved the State determinations in 1985. In a subsequent case (*National Wildlife Federation v. Adamkus*), plaintiffs contended that insufficient TMDL activity by States bordering Lake Michigan constituted a constructive submission of no TMDLs, and that EPA was required to approve or disapprove the submission. The court rejected the plaintiffs' contention because the Lake Michigan States had made actual submissions in 1985 which EPA approved, thus precluding a finding of constructive submission.

Maryland TMDL Program. Potomac Riverkeeper v. EPA, 2006 U.S. Dist. Lexis 14837 (D.Md. 2006). On December 10, 2004, the Potomac Riverkeeper and three other environmental organizations filed a complaint against EPA in the United States District Court for the District of Maryland alleging that EPA had failed to comply with its statutory mandate to oversee timely development of TMDLs by the State of Maryland. On April 7, 2006, the Court granted EPA's motion to dismiss, and in the alternative for summary judgment. In dismissing plaintiffs' suit, the court held as follows: (1) revisions in 2004 to the EPA-MD TMDL MOU do not constitute reviewable final agency action; (2) EPA approval of MD workplans submitted pursuant to the MOU do not constitute final agency action; (3) neither the CWA nor EPA's regulations requires EPA to assess the pace of statewide TMDL development as a factor in approving an individual 303(d) list or TMDLs; (4) while a 303(d) list must identify waters "targeted" for TMDL development, this is only a "goal," and EPA does not have to decide whether that goal will be met as a condition of approving the list; (5) EPA is not required to approve or disapprove a state's "priority rankings;" (6) EPA's discretionary decision not to review MD's continuing planning process since 2001, given the CWA's "from time to time" review requirement, is not a final agency action triggering judicial review; (7) EPA did not abuse its discretion under the APA by deciding not to intervene and establish TMDLs for Maryland. The court concluded that the administrative record reveals that a rational basis exists for EPA's decision in light of Maryland's past conduct, Maryland and EPA's partnership and plans for future compliance with the Clean Water Act, and EPA's reasonable assessment of the state of Maryland's TMDL program.

Establishment of TMDLs for waters impaired solely by nonpoint sources

Pronsolino v. Nastri, 291 F.3d 1123 (9th Cir. 2002). On May 31, 2002, the Ninth Circuit upheld EPA's long standing interpretation that States must identify on their section 303(d) lists waters impaired partly or solely by nonpoint sources of pollutants and establish TMDLs for such waters. The case is significant because it was the first appellate decision to squarely decide this issue. The court found that "section 303(d) is structurally a set of provisions [including section 303(a)-(c) and (e)] governing an interrelated goal-setting, information-gathering, and planning process that, unlike many other aspects of the CWA, applies without regard to the source of pollution" The Supreme Court denied review on June 16, 2003.

Requirements of approvable TMDLs

New York Reservoir Phosphorus TMDLs. NRDC v. Fox, 93 F.Supp.2d 531 S.D.N.Y. 2000). The court upheld EPA approval of TMDLs for eight NY City reservoirs. The court found that EPA properly relied upon NY's interpretation of its narrative WQS to set a TMDL for phosphorus; that the TMDLs had a proper margin of safety; that EPA justified establishing the TMDLs with annual loads, as opposed to daily loads, for phosphorus; and that the TMDLs appropriately addressed seasonal variation. On appeal, the Second Circuit affirmed in part and remanded in part. NRDC v. Muszynski, 268 F.3d 91 (2nd Cir. 2001). While holding that TMDLs could be expressed in non-daily terms, the court remanded for further explanation why phosphorus was best expressed as an annual load.

Anacostia River (D.C.) BOD and TSS TMDLs. Friends of the Earth v. EPA, 446 F.3d 140 (D.C. Cir. 2006). In this case, plaintiffs challenged, among other issues, whether TMDLs must be expressed as a "daily" load rather than as annual or seasonal loads. On November 11, 2004, the district court granted summary judgment for EPA. On April 25, 2006, the D.C. Circuit Court of Appeals reversed with instructions to vacate, holding that TMDLs must be expressed as "daily" loads. On January 16, 2007, the U.S. Supreme Court declined to review the case despite the differing approach to the "daily" load question taken by the Second Circuit in NRDC v. Muszynski, 268 F.3d 91 (2nd Cir. 2001). On November 15, 2006, EPA issued guidance recommending that all TMDLs include "daily" load calculations.

Minnesota Bacteria TMDLs. MCEA v. EPA, 2005 U.S. Dist. Lexis 12652 (D. Minn. 2005). Plaintiffs challenged EPA's approval of a Minnesota-established TMDL for fecal coliform bacteria in twenty segments of the Lower Mississippi River Basin that used an averaging approach to calculate meeting the applicable water quality standards. On June 23, 2005, the court remanded EPA's approval for reconsideration. In its decision the court said the following about proper TMDL establishment: (1) States and EPA may establish watershed or basinwide TMDLs; (2) such TMDLs must be established at a level "to achieve water quality standards for each impaired reach;" (3) the "current calculations" included in a TMDL must be designed to return the impaired segment to water quality standards; "phased" or "interim" calculations are not sufficient; and (4) illegal straight-pipe septic systems are point sources that need a wasteload allocation (WLA). In September 2005, Minnesota published a replacement TMDL for public comment. This action eliminated EPA's court-ordered obligation to establish a replacement TMDL if Minnesota failed to act.

St. Johns River (Florida) Nutrient TMDL. St Johns Riverkeeper, et al. v. EPA, No. 3:04-cv-699-J-MCR (M.D. Fla.) In October 2004, St Johns Riverkeeper and Linda Young filed a complaint in the U.S. District Court for the Middle District of Florida, Jacksonville Division, alleging that EPA's April 2004 approval of a nutrient TMDL for the Lower St. Johns River was unlawful because it failed to ensure that the River meets WQS for dissolved oxygen. Plaintiffs alleged the TMDL would not implement the applicable water quality standard for DO because the model upon which the TMDL was based predicted that ambient DO levels in the river would be in a range of 2.3mg/l to 4.8mg/l, rather than the 5.0 mg/l required by Florida WQS. On August 13, 2005, EPA filed a motion for voluntary remand of its approval of the TMDL. On September 20, 2005, the court granted EPA's motion for a remand. On October 21,

2005, EPA withdrew its approval of the LSJR TMDL. On January 23, 2006, EPA established a revised TMDL for the LSJR targeted to the 5.0 mg/l DO WQS. On January 24, 2006, plaintiffs filed a notice of voluntary dismissal.

TMDL Implementation Plans are not Mandatory

New Mexico Turbidity TMDL. Amigos Bravos v. Green, 306 F.Supp.2d 48 (D.D.C. 2004). Plaintiffs challenged EPA's approval of a New Mexico TMDL alleging that EPA approved an inadequate implementation plan. The court dismissed the case, finding that EPA had not, in fact, "approved" the implementation plan (even though EPA did approve the TMDL). More importantly, the Court found that CWA section 303(d) did not require TMDLs to contain implementation plans.

Georgia TMDLs—Sierra Club v. Meiburg, 296 F.3d 1021 (11th Cir. 2002). In July 2002, the U.S. Court of Appeals for the Eleventh Circuit reversed an order by the U.S. District Court that had required EPA to establish implementation plans in Georgia in connection with TMDLs already required by the Consent Decree in that case. The Court held that neither the Clean Water Act nor EPA's regulations require an implementation plan as an element of TMDLs.

Contents of 303(d) Lists

EPA Approval of Florida 2002 List. Sierra Club v. Leavitt, 488 F.3d 904 (11th Cir. 2007). Plaintiffs challenged Region 4's approval of Florida's 2002 list. The case involved a number of record issues regarding EPA's action on the list. The district court found in EPA's favor. The plaintiffs appealed, and the court of appeals decided that the state does not need to list waters not meeting water quality criteria because of "natural conditions"; the state does not need to list waters that are now meeting standards, and even where standards expressed as not to be exceeded at any time, EPA may look at the "totality" of the data; the state does not need to list where there is a statewide fish advisory for mercury; EPA is not required when it partially disapproves a list to develop an entirely new list; and EPA is not required to review the prioritization of waters, but is required to review whether state considered the statutory factors in establishing prioritization. The court also remanded certain issues to the district court to resolve factual disputes about whether certain waters were inappropriately excluded from the list (including waters excluded due to a failure to consider data older than 7.5 years) and to determine whether the state considered the statutory factors in setting its priority ranking. After EPA reviewed the status of the waterbodies at issue and sent a letter to the state with EPA's conclusions, the parties stipulated to dismissal of the case.

EPA Approval of California 2006 303(d) List. Klamath Riverkeeper v. EPA, no. 3:07cv3908 (N.D. Cal.). This case involved a challenge to EPA's approval of California's 2006 303(d) List without including waters as impaired by blue green algae and its toxins. EPA reconsidered its decision and added one segment as impaired by toxins. The case was dismissed on July 11, 2008.